United Nations A/HRC/37/60

General Assembly

Distr.: General
15 January 2018

Original: English

Human Rights Council
Thirty-seventh session
26 February–23 March 2018
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

Note by the Secretariat

In her report, prepared pursuant to Human Rights Council resolutions 7/13 and 34/16, the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material provides an overview of her activities since her previous report, presented to the Council in March 2017. The report also contains a thematic study on surrogacy and sale of children, and recommendations on how to uphold the prohibition of, and how to prevent, the sale of children.

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I. Introduction

1. The present report is submitted pursuant to Human Rights Council resolutions 7/13 and 34/16. It contains information on the activities of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material since her previous report, which was presented to the Human Rights Council in March 2017. It also contains a thematic study on surrogacy and sale of children.

II. Activities

A. Country visits

2. The Special Rapporteur undertook a visit to the Dominican Republic from 8 to 15 May 2017.[1] She also conducted a visit to the Lao People's Democratic Republic, from 8 to 16 November 2017.[2] The report of the visit to the Lao People's Democratic Republic will be presented to the Human Rights Council at its fortieth session. The Special Rapporteur thanks both Governments for their cooperation before and during the visit.

3. The Government of Ireland has agreed to a visit of the Special Rapporteur from 14 to 21 May 2018, and the Government of Malaysia has accepted a visit from 24 September to 1 October 2018. The Special Rapporteur thanks both Governments for accepting the visits and looks forward to a constructive dialogue in the preparation for both missions. She also invites the Government of India to propose dates for a visit in 2019.

B. Other activities

1. Conferences and engagement with stakeholders[3]

4. On 4 October 2017, the Special Rapporteur chaired a session on child sexual abuse online, at the World Congress on Child Dignity in the Digital World, organized by the Centre for Child Protection of the Pontifical Gregorian University in Rome.

5. On 10 October 2017, the Special Rapporteur and the Special Rapporteur on trafficking in persons, especially women and children, presented their joint report on vulnerabilities of children to sale, trafficking, and other forms of exploitation in situations of conflict and humanitarian crisis, to the General Assembly at its seventy-second session.[4] On 11 October 2017, she participated in a panel discussion on preventing violence against children and helping to focus efforts and track progress on the implementation of target 16.2 of the 2030 Agenda for Sustainable Development, which was organized by the United Nations Children's Fund (UNICEF), and by the Delegation of the European Union to the United Nations and the Permanent Mission of Uruguay to the United Nations, in New York.

2. Communications

6. Summaries of six communications sent by the Special Rapporteur during the reporting period appear in the communications reports of special procedures.

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[1] See A/HRC/37/60/Add.1.

[2] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22416&LangID=E.

[3] For activities of the Special Rapporteur between February and July 2017, see A/72/164.

[4] See A/72/164.

III. Study on surrogacy and sale of children

A. Objective, scope and methodology

7. The mandate of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material includes "matters relating to the sale of children".[5] The Special Rapporteur's last two reports have addressed a "gap" that arose when inadequate attention had been given to issues beyond "the sexual exploitation of children".[6] Hence, the Special Rapporteur's report to the General Assembly at its seventy-first session focused on the sale of children for the purpose of forced labour[7] and her report to the Human Rights Council at its thirty-fourth session focused on illegal adoptions.[8]

8. The present study addresses a further such "gap", regarding the sale of children in the context of surrogacy. It is a logical follow-up to the study on illegal adoptions, wherein the Special Rapporteur already noted that "the international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children".[9] The Committee on the Rights of the Child has consistently expressed similar concerns that surrogacy could lead or amount to the sale of children.[10]

9. The present study therefore examines when surrogacy arrangements constitute the sale of children under international human rights law and as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. It reviews the wide spectrum of policies on surrogacy, in a context where explicit and specific international norms are currently lacking. The study notes the presence of abusive practices in both unregulated and regulated contexts. In order to strengthen the legitimacy and viability of the fundamental norm prohibiting the sale of children, the study provides analysis and recommendations on implementing this prohibition as it relates to surrogacy.

10. "Surrogacy" refers to a form of "third party" reproductive practice in which the intending parent(s) and the surrogate mother agree that the surrogate mother will become pregnant, gestate, and give birth to a child. Surrogacy arrangements generally include an expectation or agreement that the surrogate mother will legally and physically transfer the child to the intending parent(s) without retaining parentage or parental responsibility.[11] Surrogacy generally occurs in the context of assisted reproductive technologies — such as in vitro fertilization and embryo transfer for gestational (or full) surrogacy (where the surrogate mother is genetically unrelated to the child) and artificial insemination for traditional (or partial) surrogacy (where the surrogate mother is genetically related to the child). Gametes can also be obtained, by purchase or "donation", from additional parties who are neither the intending parent(s) nor the surrogate mother, and hence the intending parent(s) may or may not be genetically related to the child.[12]

11. The analysis of sale of children that is contained in the present study is applicable to both international and national surrogacy, traditional and gestational surrogacy, and commercial and altruistic surrogacy. The study concentrates on the prohibition of sale of

[5] See Commission on Human Rights resolution 1990/68.

[6] See A/71/261, para. 15.

[7] Ibid., para. 16.

[8] See A/HRC/34/55.

[9] Ibid., para. 52.

[10] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[11] See the Hague Conference on Private International Law (HCCH), "A preliminary report on the issues arising from international surrogacy arrangements" (March 2012), available at https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf.

[12] Ibid. It would also be traditional surrogacy if in vitro fertilization and embryo transfer were used employing the surrogate mother's eggs.

children and child rights as per international standards and protection issues that arise under contemporary surrogacy practice. The implications of surrogacy for women's rights is beyond the scope of the present study, except as regards issues that affect both children's rights and women's rights, or certain clear rights violations that illuminate regulatory or enforcement issues. The Special Rapporteur echoes the position of other human rights experts who have stated that discrimination against women, through the instrumentalization of their bodies for cultural, political, economic and other purposes, including when rooted in patriarchal conservatism, cannot be accepted.[13] The Special Rapporteur encourages other human rights mechanisms and United Nations entities to contribute with further research to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations. Nothing in the present report should be interpreted as a restriction of women's autonomy in decision-making or of their rights to sexual and reproductive health.

12. The study benefited from contributions by international experts and relevant international organizations. The Special Rapporteur organized an expert meeting on surrogacy in Geneva on 1 November 2017. The Special Rapporteur also participated in an expert meeting on surrogacy convened by the International Social Service in May 2017 at the Department of Law of the University of Verona, Italy. The Special Rapporteur particularly wants to thank members of the core expert group of the International Social Service surrogacy project for contributions in developing the study. The Special Rapporteur has benefited from reviewing the work of the Committee on the Rights of the Child, the Council of Europe and the Hague Conference on Private International Law. The Special Rapporteur has also gained insight from her missions to various countries.

B. Urgent concerns

13. Surrogacy as a reproductive practice is on the rise. Indeed, as intercountry adoptions have fallen in number and increasingly become subject to international standards, the numbers of international surrogacy arrangements have rapidly increased in the absence of international standards.[14] Therefore, surrogacy, like intercountry adoption in the 1980s and 1990s, has emerged as an area of concern where a demand-driven system may endanger the rights of children.[15] There is also "unease" and concern that "the practice of engaging surrogates in States with emerging economies to bear children for more wealthy intending parents from other States has dimensions similar to those discussed in the preparatory reports on intercountry adoption".[16]

14. The cross-border patterns of international surrogacy arrangements are diverse. Commonly, intending parents from developed countries, including Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, the United Kingdom of Great Britain and Northern Ireland and the United States of America, have engaged in commercial international surrogacy arrangements with surrogate mothers in developing countries, such as Cambodia, India, the Lao People's Democratic Republic, Nepal and Thailand.[17] However, California and other jurisdictions in the United States are centres for commercial international surrogacy arrangements, as are Georgia, the Russian Federation and Ukraine, creating a different set of

[13] See A/HRC/32/44, para. 106 (a).

[14] See Katarina Trimmings and Paul Beaumont, eds., *International Surrogacy Arrangements* (2013), pp. 439, 441 and 442.

[15] See J.H.A. van Loon, "Report on intercountry adoption", preliminary document No. 1, sect. E, pp. 51–55, available at https://assets.hcch.net/upload/adoption_rpt1990vloon.pdf; cf. HCCH, "A preliminary report on the issues arising from international surrogacy arrangements"; and see Chief Federal Magistrate Pascoe (Australia), "Intercountry surrogacy – a new form of trafficking?", available at www.austlii.edu.au/au/journals/FedJSchol/2012/15.pdf; and Chantal Sachet (International Social Service), "Children and adoption: which rights and whose?", UNICEF, *Innocenti Digest 4: Intercountry Adoption*, pp. 12–13.

[16] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 5 as well as footnote 28.

[17] See Trimmings and Beaumont, p. 472.

cross-border relationships.[18] In addition, intending parents from China frequently engage in commercial surrogacy in South-East Asia and the United States.[19] All of these patterns pose human rights concerns.

15. National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law (i.e. in Australia, Mexico and the United States).[20] The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational.[21] Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit "commercial", "for-profit" or "compensated" surrogacy, while explicitly or implicitly permitting "altruistic" surrogacy.[22] Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy.[23] Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices.[24] However, Georgia, the Russian Federation and Ukraine, and some states in the United States, have for a sustained period of time chosen to remain centres for international surrogacy arrangements.[25]

16. Laws governing surrogacy also vary across a spectrum from extensive to non-existent.[26] Although there are historical antecedents to surrogacy,[27] modern practices are related to the rise of assisted reproductive technologies, which not only offer new reproductive opportunities but also introduce new legal and ethical dilemmas. Hence, it is often said that the law is having difficulty keeping up with developing technologies and practices.[28] Many countries, for example Argentina, Belgium, Guatemala, Ireland and Japan,

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[18] Ibid., pp. 311–324, 357–366 and 464–469. See also HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", footnote 94; and HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements" (March 2014), para. 130, available at https://assets.hcch.net/docs/bb90cfd2-a66a-4fc4-a05b-55f33b009cfc.pdf; and *Re D (A Child)* (Surrogacy) [2014] EWHC 2121 (Fam) (Georgia).

[19] See footnotes 22–24 below.

[20] See Trimmings and Beaumont, pp. 25, 256 and 257; and Courtney Joslin (reporter), Uniform Parentage Act Drafting Committee (8 February 2016), pp. 3–6, available at www.uniformlaws.org/shared/docs/parentage/2016feb8_AUPA_Memo_Revision%20Drafting%20Committee%20Surrogacy.pdf.

[21] See Trimmings and Beaumont, pp. 119–142.

[22] Ibid., p. 454; HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 18; and Chief Judge John Pascoe (Australia), Third Annual Legalwise International Family Law Conference, Shanghai, China, 17–20 September 2014, available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2014/paper-pascoe-international-commercial-surrogacy.

[23] See Chief Judge John Pascoe (Australia), Third Annual Legalwise International Family Law Conference; and Trimmings and Beaumont, pp. 443–454.

[24] See "An update on the work of the Hague Conference on Private International Law", *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht*, No. 144 (2017); and Audrey Wilson, "How Asia's surrogate mothers became a cross-border business, *South China Morning Post*, available at www.scmp.com/week-asia/society/article/2096675/how-asias-surrogate-mothers-became-cross-border-business.

[25] See Trimmings and Beaumont, pp. 357–365 and 443. In regard to Georgia, see HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", footnote 94; HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements", para. 130; and *Re D (A Child)* (Surrogacy) [2014] EWHC 2121(Fam).

[26] See Trimmings and Beaumont, pp. 443–454.

[27] See David Smolin, "Surrogacy as the sale of children", *Pepperdine Law Review*, vol. 43 (2016), pp. 265 and 289–302, available at https://works.bepress.com/david_smolin/19/.

[28] See, for example, Chief Federal Magistrate Pascoe, "The rise of surrogate parenting", twenty-fourth Law Asia Conference, Seoul, Republic of Korea, 10 October 2011, at sect. 6 (quoting Justice

and many jurisdictions in the United States, have thus far failed to enact legislation concerning surrogacy, whether prohibitionist or permissive, leaving courts and competent authorities to develop their own responses to the developing practice of surrogacy.[29] In the absence of surrogacy-specific laws, surrogacy arrangements are often completed using pre-existing laws governing parentage, termination of parental rights and adoption.[30] Those jurisdictions which have legislated more explicitly as to surrogacy vary in the degree of comprehensiveness and clarity. The absence of clear and comprehensive laws addressing surrogacy can lead to unregulated commercial surrogacy developing, with accompanying exploitative practices.[31]

17. Intending parents often travel from jurisdictions prohibiting commercial surrogacy, such as Australia, France or Italy, to jurisdictions permitting commercial surrogacy, and then seek to return with surrogate-born children to their home jurisdiction. Such travel intentionally evades prohibitionist laws and creates dilemmas for the jurisdictions involved.[32] Competent authorities and courts are often placed in the situation of being asked to validate, after the fact, international surrogacy arrangements that are illegal in one or both jurisdictions.[33] The imperative to protect the rights of these surrogate-born children adds to the dilemma.[34] Sympathy for intending parents and their wish to engage in family formation further complicates the issues. Concern for surrogate mothers, especially those who are exercising agency in contexts that often are particularly vulnerable to exploitation due to poverty, powerlessness, a lack of education, and multiple forms of discrimination, sharpens the dilemmas faced by States.[35]

18. International commercial surrogacy networks swiftly move from jurisdiction to jurisdiction as laws change. Indeed, sometimes in vitro fertilization and embryo transfer are conducted in one State, and then the surrogate mother is moved to a second State for the birth, with the intending parent(s) coming from a third State.[36] Hence, the need for the development and implementation of international standards is clear.

19. These unresolved dilemmas have created urgent concerns both for States and for the international community. Some are primarily concerned with the dilemmas and impact on human rights produced when international surrogacy is conducted to evade national prohibitions. Others are primarily concerned with abusive practices that can occur due to the lack of governing international and/or national law. From this perspective, the required solution is international and national legal frameworks that clearly regulate surrogacy.[37]

20. Some recommend legalizing and regulating both altruistic and commercial surrogacy. The hope is that legalization combined with a regulatory framework would protect the rights, dignity and interests of all parties, while avoiding the harms and violations of underground

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Benjamin), available at www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/reports-and-publications/speeches-conference-papers/2011/speech-pascoe-lawasia-2011.

[29] See Trimmings and Beaumont, pp. 5–24, 49–83, 167–174, 219–230, 247–253 and 391; and European Parliament, "A comparative study on the regime of surrogacy in EU member States" (2013), p. 206, available at www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2013)474403.

[30] Ibid.

[31] See sources cited in footnote 10 above; as well as Trimmings and Beaumont, p. 442; and HCCH, "A preliminary report on the issues arising from international surrogacy arrangements".

[32] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", paras. 25, 28, 31 and 32; and the European Court of Human Rights — *Mennesson v. France*, application No. 65192/11, judgment of 26 June 2014; *Labassee v. France*, application No. 65941/11, judgment of 26 June 2014; and Paradiso and *Campanelli v. Italy*, application No. 25358/12, Grand Chamber judgment of 24 January 2017.

[33] See HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements", para. 215.

[34] See *Re X and Y* (Foreign Surrogacy) [2008] EWHC 3030 (Fam), para. 22, per Justice Hedley.

[35] See HCCH, "A study of legal parentage and the issues arising from international surrogacy arrangements".

[36] See Audrey Wilson, "How Asia's surrogate mothers became a cross-border business".

[37] See HCCH — "A preliminary report on the issues arising from international surrogacy arrangements" and "A study of legal parentage and the issues arising from international surrogacy arrangements".

or unregulated surrogacy practice. Others argue for prohibiting all forms of surrogacy, based on human dignity concerns, or on the view that surrogacy is inherently exploitative or that in current contexts of power imbalance it is usually exploitative. The most frequently preferred answer, as indicated by State legislation and practice, has been to prohibit commercial surrogacy while permitting altruistic surrogacy, based on the viewpoint that commercial surrogacy commonly commodifies children and exploits surrogate mothers.[38] The inability of the Council of Europe to adopt a position exemplifies the depth of the conflict, as an overwhelming majority favoured either prohibiting commercial surrogacy or prohibiting all surrogacy, and yet ultimately no position was adopted due to the split between those positions.[39]

21. Even if agreement could be reached among the various options regarding prohibition, the issue of "appropriate" regulation is equally divisive. Thus, there are fundamental disagreements on basic regulatory issues — such as determinations of parentage, whether to conduct best interests determinations, regulation of the financial aspects of surrogacy, the status of "surrogate mothers" and even the terminology, implementation of the rights of identity and access to origins, suitability reviews of intending parents, the significance of genetic connections, and the role of contracts and the courts. Thus, even those who argue for legalizing and regulating surrogacy may completely disagree about the appropriate forms of regulation.[40]

22. Amidst this controversy, the present study identifies a safe harbour, in a simple premise: all States are obligated to prohibit, and to create safeguards to prevent, the sale of children. While the imperative to prohibit and prevent the sale of children does not provide answers to all policy debates over surrogacy, it does narrow the scope of permissible approaches.

23. This focus on the prohibition of sale of children responds to the risk that States and the international community would attempt to legalize and normalize the sale of children and other human rights violations when regulating surrogacy. Amidst the demand for governing law, the demand for children, and the influence of a wealthy and growing surrogacy industry, there is a risk that the governing law that is adopted will undermine fundamental human rights. The demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights.[41]

24. Surrogacy, in particular commercial surrogacy, often involves abusive practices. Furthermore, it involves direct challenges to the legitimacy of human rights norms, as some of the existing legal regimes for surrogacy purport to legalize practices that violate the international prohibition on sale of children, as well as other human rights norms. Moreover, many of the arguments provided in support of these legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit. Thus, if this type of governing legal regime becomes accepted, whether as international or national law, or through recognition principles, it would undermine established human rights norms and standards.

25. The international community cannot relinquish gains made in the development of child rights norms and standards, including those developed in the context of adoption. In prior decades, the international community confronted adoption systems which were based on satisfying adult demands for children and were driven by commercial interests and

[38] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements", para. 18; see also Judge Pascoe 2014 as per footnote 22 above.

[39] See "An update on the work of the Hague Conference", pp. 102–103 and footnotes 32–33.

[40] See HCCH — "A preliminary report on the issues arising from international surrogacy arrangements" and "A study of legal parentage and the issues arising from international surrogacy arrangements"; cf. American Bar Association report (see below).

[41] Cf. American Bar Association, report and resolution 112B, available at https://www.americanbar.org/content/dam/aba/uncategorized/family/Hague_Consideration.authcheckdam.pdf.

financial incentives, and which in practice exploited the vulnerability of birth parents.[42] In response, the international community has insisted that the best interests of the child be the "paramount consideration" in regard to adoption,[43] created standards requiring strict regulation of the financial aspects of intercountry adoption,[44] sought to protect vulnerable birth families, and denied that prospective adoptive parents have a right to a child.[45] Implementation of these norms in relation to adoption has been difficult, but significant progress has been made in terms of standard-setting, monitoring and compliance.[46]

26. Yet, the commercial surrogacy industry and its advocates have insisted that the kinds of systems rejected by the international community in regard to adoption be accepted in regard to surrogacy systems. Hence, the commercial surrogacy industry and its advocates insist that commercial surrogacy be accepted worldwide as a market-based system designed to respond primarily to adult demands for children, whereby parentage is determined primarily by contract. For example, the American Bar Association, which represents over 400,000 attorneys,[47] advocates for commercial surrogacy nationally and internationally.[48] The stance of the American Bar Association is of international significance because it advocates for commercial international surrogacy arrangements and for intermediaries who practise globally.

27. The American Bar Association notes that "it is undeniable that the commissioning of children through surrogacy — for money — represents a market".[49] The American Bar Association praises this "market", noting that "market-based mechanisms have allowed international surrogacy to operate efficiently".[50] The American Bar Association rejects application of the best interests of the child standard to surrogacy,[51] rejects most forms of suitability review and evaluation of parental fitness of intending parents,[52] rejects caps for compensation for surrogate mothers and gamete donors,[53] rejects licensing requirements for surrogacy agencies,[54] rejects rights to birth records or origins information,[55] rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a "model for a surrogacy convention",[56] and rejects bilateral treaties on surrogacy.[57] The American Bar Association states that "any focus on regulating the international surrogacy market itself is misguided".[58] Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns;[59] hence, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations".[60] If this position is endorsed, the gains in developing child rights norms

[42] See, for example, Saclier, "Children and adoption", pp. 12–13; and van Loon, "Report on intercountry adoption".

[43] See the Convention on the Rights of the Child, art. 21.

[44] Ibid., art. 21 (d); 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, "Note on the financial aspects of intercountry adoption (2014), available from https://www.hcch.net/en/publications-and-studies/details4/?pid=6310.

[45] See the 1993 Hague Convention, art. 4; and Saclier, "Children and adoption", pp. 12–13.

[46] See the Convention on the Rights of the Child, arts. 20–21; the 1993 Hague Convention; and A/HRC/34/55.

[47] See https://www.americanbar.org/about_the_aba.html.

[48] See American Bar Association report and resolution. It should be noted that the Association does not represent the Government of the United States and that there are both permissive and prohibitionist jurisdictions in the United States. See Joslin, footnote 7.

[49] American Bar Association report, p. 9.

[50] Ibid., p. 11.

[51] Ibid., pp. 15–16.

[52] Ibid., pp. 4, 17–18.

[53] Ibid., pp. 20–21.

[54] Ibid., p. 20.

[55] Ibid., pp. 21–22.

[56] Ibid., p. 15.

[57] Ibid., pp. 4–5.

[58] Ibid., p. 14.

[59] Ibid., p. 1.

[60] Ibid., p. 7.

and standards in relation to adoption will be erased, and a new generation of human rights violations will emerge.

28. There are significant differences between adoption and surrogacy, and not all rules applicable to adoption apply to surrogacy. Nonetheless, certain human rights principles are applicable to both, including the prohibition of the sale of children,[61] the best interests of the child as a paramount consideration,[62] the lack of a right to a child,[63] strict regulations and limitations regarding financial transactions,[64] rights to identity and access to origins,[65] and protections against exploitation.[66] The present report focuses on the necessity of maintaining these human rights standards against the pressures created by the large-scale practice of a market- and contract-based form of commercial surrogacy.

C. Abusive practices in surrogacy systems

29. Abusive practices in the context of surrogacy are well documented. Examples include convicted sex offenders from Australia and Israel employing surrogate mothers from India and Thailand,[67] a wealthy Japanese man employing 11 surrogate mothers, leading to the births of 16 infants in Thailand and India,[68] the abandonment of a surrogacy-born infant with disability in Thailand,[69] and the abandonment or sale of "excess" surrogate-born infants in twin births in India.[70] Commercial surrogacy networks transfer surrogate mothers, sometimes while pregnant, across national borders in order to evade domestic laws; in one case, 15 Vietnamese women were found and freed by Thai authorities, leading to human trafficking charges in the context of a baby-farming scheme.[71]

30. Many of these abuses occur in unregulated contexts, often in cases involving intending parents from Western countries employing for-profit intermediaries to contract with vulnerable surrogate mothers in developing countries.[72] However, abusive practices also occur in purportedly well-regulated commercial surrogacy jurisdictions. For example, two prominent surrogacy attorneys were criminally convicted in a baby-selling ring in California, a centre for international surrogacy arrangements.[73] According to governmental authorities, a prominent surrogacy attorney admitted that "she and her conspirators used gestational carriers to create an inventory of unborn babies that they would sell for over $100,000

[61] See the Convention on the Rights of the Child, art. 35; and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

[62] See the Convention on the Rights of the Child, arts. 3 and 21.

[63] Saclier, "Children and adoption", pp. 12–13; and Van Bueren, *The International Law on the Rights of the Child* (1995).

[64] See the Convention on the Rights of the Child, art. 21 (d); the 1993 Hague Convention, arts. 4 (c) (3), 8 and 32; and HCCH, "Note on the financial aspects of intercountry adoption".

[65] See the Convention on the Rights of the Child, arts. 7, 8 and 9.

[66] Ibid., art. 35; the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and the Trafficking in Persons Protocol, of 2000.

[67] See, for example, www.geneticsandsociety.org/article.php?id=6933; www.abc.net.au/news/2014-08-06/baby-gammys-father-convicted-on-more-than-20-child-sex-charges/5653502; and [2016] FCWA 17, available at www.familycourt.wa.gov.au/_files/Publications/2016FCWA17anon.pdf.

[68] See Samantha Hawley, Japanese man fathers 16th baby via surrogate in Thailand, 9 September 2014, at www.abc.net.au/news/2014-09-10/japanese-surrogacy-man-has-another-baby/5732856.

[69] See [2016] FCWA 17 as per footnote 67 above.

[70] See, for example, www.bionews.org.uk/page_460525.asp and http://nymag.com/thecut/2015/03/dark-side-of-international-surrogacy.html.

[71] See https://www.pri.org/stories/2011-03-18/underworld-upending-asian-baby-farm and www.scmp.com/week-asia/society/article/2096675/how-asias-surrogate-mothers-became-cross-border-business.

[72] See sources cited in footnotes 67–71 above.

[73] Smolin, "Surrogacy as sale of children", pp. 328–330.

each".[74] The convicted attorney told the local media that, as to abusive practices, she was the "tip of the iceberg" of a "corrupt" "billion-dollar industry".[75]

31. Another case from California, *Cook v. Harding*,[76] reveals the intentional regulatory omissions in a regulated commercial surrogacy jurisdiction: "The statute places no conditions on who can serve as a surrogate (beyond requiring that she not be genetically related to the foetuses) or who may solicit the services of a gestational carrier … No minimum levels of income, intelligence, age or ability are required for either the surrogate or the intended parent(s)."[77]

32. In Cook, the surrogacy agency matched a 47-year-old surrogate mother with a 50-year-old single intending father. Three embryos were transferred, leading to a triplet pregnancy. Conflicts arose when the intending father balked at paying the costs of the high-risk triplet pregnancy, and also demanded a reduction abortion. The surrogacy contract contained a common provision that reduction abortion decisions would be made by the intending parent. The surrogate mother refused the reduction abortion.[78] Hence, "C.M.'s attorney informed Cook in writing that, by refusing to reduce, she was in breach of the contract and liable for money damages thereunder".[79] It is also argued that surrogate mothers who refuse to submit to reduction abortions are liable for monetary damages, including "the cost of medical treatment (for) … a resulting child."[80]

33. Hence, surrogacy regulations in some jurisdictions are designed to enforce contracts, obtain children for intending parents, maintain the industry's profits, and intentionally reject most protections for children or surrogate mothers. These kinds of contract-based models lead to systemic abusive practices. Indeed, these contract-based legal regimes lead to the sale of children, as they include the kinds of pre-birth contractual determinations of parentage that the Committee on the Rights of the Child has warned can lead to the sale of children.[81]

D. International legal framework

34. It is stated in article 35 of the Convention on the Rights of the Child that: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." The phrase "for any purpose or in any form" is significant, and surrogacy is no exception to the article's prohibitions. Family formation should not be accomplished through "the abduction of, the sale of or traffic in children".

35. The prohibition of sale of children is clearly stated in article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Article 2 (a) of that Optional Protocol defines sale of children as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration". The premise of the Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography is that the sale of children is a serious

[74] Federal Bureau of Investigation, "Baby-selling ring busted". Available at https://archives.fbi.gov/archives/sandiego/press-releases/2011/baby-selling-ring-busted.

[75] Rory Devine and R. Stickney, "Convicted surrogacy attorney". Available at www.nbcsandiego.com/news/local/Theresa-Erickson-Surrogacy-Abuse-Selling-Babies-140942313.html.

[76] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order.

[77] Ibid., p. 6.

[78] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order; and Dov Fox, "Surrogacy contracts, abortion conditions, and parenting licenses", available at http://blogs.harvard.edu/billofhealth/2016/06/07/surrogacy-contracts-abortion-conditions-and-parenting-licenses-in-the-curious-case-of-cook-v-harding/.

[79] See https://www.scribd.com/document/315077548/Cook-v-Harding-Dismissal-Order, p. 8.

[80] Dov Fox, "Surrogacy contracts, abortion conditions, and parenting licenses".

[81] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

harm and human rights violation in and of itself, without having to prove any other rights violation under the Convention such as sexual or labour exploitation.[82]

36. The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, confirms that the prohibitions of article 35 of the Convention on the Rights of the Child and article 1 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography apply to methods of family formation (such as intercountry adoption), stating in its article 1: "The objects of the present Convention are ... to establish a system of cooperation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children."

37. The Convention on the Rights of the Child assumes a permissible diversity of State policies on both domestic and intercountry adoption. Hence, some States view both domestic and intercountry adoption as positive methods of family formation, while other States do not provide in their national law for one or both.[83] The Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, makes it clear that regardless of those policy differences, States must create safeguards to prevent the abduction of, the sale of or traffic in children from being used as a means of family formation. This principle also applies to surrogacy. In that respect, the Committee on the Rights of the Child has been consistent in its review of States that are affected by surrogacy, stating that if not properly regulated, surrogacy can constitute sale of children.[84] Thus, States, regardless of their perspectives on surrogacy, must prohibit, and create safeguards to prevent, the abduction of, the sale of or traffic in children in the context of surrogacy.

E. Defining commercial surrogacy

38. One definition of commercial surrogacy, also known as "for-profit" or "compensated" surrogacy, focuses on the contractual and transactional — rather than gratuitous — relationship between the intending parent(s) and the surrogate mother. Hence, commercial surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration.

39. Commercial surrogacy also includes "reimbursement" that goes beyond reasonable and itemized expenses incurred as a direct result of the surrogacy arrangement.[85] The inference is that payments for unreasonable or non-itemized "expenses" are disguised payment for gestational services and/or transfer of the child.

40. The involvement of for-profit intermediaries is another indication of commercial surrogacy. For the purpose of the present report, intermediaries are defined as parties (persons or organizations/institutions) that bring together intending parents and surrogate mothers, and/or mediate the ongoing surrogacy arrangement — including medical clinics, medical professionals, attorneys, surrogacy agencies or "brokers". Medical professionals or clinics, and attorneys, receiving reasonable compensation for the professional services necessary to surrogacy, are not necessarily intermediaries, if they do not perform these functions of establishing and mediating the relationship between the intending parents and the surrogate mother. This supplementary definition of commercial surrogacy is necessary because intermediaries often receive the largest profits and create large-scale national and transnational surrogacy markets and networks.

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[82] John W. Tobin, "To prohibit or permit: what is the (human) rights response to the practice of international commercial surrogacy?" *International and Comparative Law Quarterly*, vol. 63, No. 2 (2014), University of Melbourne Legal Studies research paper No. 689, pp. 18–21 and 24–27, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476751.

[83] See 1993 Hague Convention, art. 21; and *Child Adoption: Trends and Policies*, United Nations publication, available at www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

[84] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[85] See HCCH, "A preliminary report on the issues arising from international surrogacy arrangements".

F. Surrogacy and sale of children

41. Commercial surrogacy as currently practised usually constitutes sale of children as defined under international human rights law. As will be described in section IV below, commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards, and in a manner contrary to what exists in many commercial surrogacy regimes. Altruistic surrogacy, too, must be appropriately regulated to avoid the sale of children (see section III (G) (8) below).

42. Under article 2 (a) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, surrogacy arrangements constitute sale of children whenever the surrogate mother or a third party receives "remuneration or any other consideration" in exchange for transferring the child. There are three elements in the definition of sale of children: (a) "remuneration or any other consideration" (payment); (b) transfer of a child (transfer); and (c) the exchange of "(a)" for "(b)" (payment for transfer).

1. First element: remuneration or any other consideration (payment)

43. The receipt or promise of "remuneration or any other consideration" (payment) occurs by definition in all commercial surrogacy arrangements. A promise of future payment would constitute "other consideration", and hence the element is established even before payments are made. The question of payment in altruistic surrogacy is addressed in section III (G) (8) below.

2. Second element: the transfer of a child (transfer)

44. Transferring a child entails either a legal transfer of the child or physically transferring the child. Legal transfer of the child would include transfer of parentage or parental responsibility.[86] Physical transfer of the child would include the act of one person or group of persons physically turning a child over to another person or group of persons. Physical transfer of the child does not require a legal transfer. The concept of sale of children does not require the transferor to have parentage or legal parental responsibility. A trafficker illicitly sells a child by physically transferring a child in exchange for "remuneration or any other consideration", even though his or her control of the child is illegal.

45. Legal transfer of a child occurs or is promised in surrogacy arrangements. Women who give birth are generally accorded parentage and parental responsibility at birth under the national law of all States. Indeed, this is a requirement under the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, even in instances where an intercountry adoption is planned.[87] The surrogate mother's status as a parent at birth is generally recognized in traditional surrogacy arrangements, as the surrogate mother is both the genetic and the gestational mother. Hence, a transfer is necessary for the intending parents to attain parentage.

46. The situation is more complicated as regards gestational surrogacy. Since there is no jurisdiction which generally requires women who give birth to prove a genetic connection to establish parentage, the lack of a genetic connection is not an obstacle to parentage. Indeed, surrogacy advocates do not consider a lack of genetic connection to be a barrier to intending parents establishing parentage, and some surrogacy regimes do not require even one intending parent to be genetically related.[88]

47. Nonetheless, some surrogacy jurisdictions have created legal rules by which gestational surrogate mothers, often relabelled "gestational carriers", "surrogate carriers" or "gestational surrogates", lose parentage prior to birth, based upon a contract made prior to

[86] The term "parental responsibility" is based on the Convention on the Rights of the Child (art. 18), and includes the term "custody" used in some jurisdictions.

[87] See the 1993 Hague Convention, art. 4 (c) (4).

[88] See the American Bar Association report; and the California Family Code, sects. 7960–7962.

embryo transfer.[89] Under such laws, a valid surrogacy contract effectuates the transfer of the child either by operation of law, or else by pre- or post-birth action by a court or other competent authority, with the court or competent authority obligated to effectuate the transfer so long as the contract itself meets certain minimum standards.[90] Hence, it is the surrogacy contract, rather than merely being genetically unrelated, that for these surrogacy jurisdictions renders the surrogate mother an unrelated "gestational carrier".[91] Under those circumstances, the surrogacy contract itself includes a legal transfer of parentage, or at least a pivotal and irreversible step toward such. The surrogate mother, in signing a surrogacy contract, is participating in a legal transfer of the child. Thus, in *Johnson v. Calvert*, the Supreme Court of California specifically referred to the surrogate mother "contracting away any rights to the child".[92]

48. In addition, surrogacy contracts, explicitly or implicitly, include an undertaking by the surrogate mother to cooperate with legal proceedings which ensure that she and her spouse (if applicable) terminate parentage and parental responsibility, and that parentage and parental responsibility legally reside with the intending parents.[93] In some jurisdictions, the transfer is done prior to the birth, based on the actions of courts or other competent authorities approving the surrogacy arrangement.[94] Once again, the surrogate mother's pre-birth actions facilitate the vesting of parentage in the intending parents. Therefore, surrogacy arrangements typically include a promised or actual legal transfer of a child. Legal systems which accomplish the transfer prior to birth do not alter the existence of a legal transfer.

49. Surrogacy arrangements also include a promised or actual physical transfer of the child from the surrogate mother to the intending parent(s). Indeed, some surrogacy contracts seek to contractually or physically restrict the surrogate mother's freedom of movement in order to ensure control by the intending parent(s) over the child at birth.[95] Explicitly or implicitly, the surrogate mother is promising in surrogacy arrangements to physically transfer the resulting child to the intending parent(s).

3. Third element: the exchange (payment for transfer)

50. The third and final required element in sale of children is the term "for", which refers to an exchange: the "remuneration or any other consideration" (payment) must be made "for" the transfer of the child.

51. Commercial surrogacy arrangements typically include this element of an exchange between the payment and the transfer. In commercial surrogacy arrangements, the promised and actual transfer of the child is usually of the essence of the arrangement and accompanying agreements and contracts, without which payments would be neither made nor promised. If a surrogate mother underwent becoming pregnant, pregnancy, and giving birth, she would not be deemed to have fulfilled her promises and contractual obligations if she refused to participate in the legal and physical transfer of the child to the intending parent(s). While the surrogate mother is paid, in commercial or compensated surrogacy arrangements, for the services of gestating and giving birth to a child, she is also being paid for the transfer of the child. Commercial surrogacy legislation and practice which mandate the enforcement of the surrogacy contract, including specifically the transfer of parentage and parental responsibility,[96] make it even clearer that the transfer is of the essence of the contract and is a part of the consideration for which the surrogate mother is paid. Thus, under current practice, the third element of an exchange is met in most commercial surrogacy arrangements.

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[89] See Joslin, pp. 3–6 (in the United States: California, Maine and New Hampshire).
[90] Ibid.
[91] Ibid.
[92] 851 P.2d (1993), p. 776 and pp. 781–782.
[93] Ibid., p. 778.
[94] See Joslin.
[95] Deborah Forman, "Abortion clauses in surrogacy contracts", *Family Law Quarterly*, vol. 49 (2015), p. 29; and see https://www.pri.org/stories/2011-03-18/underworld-upending-asian-baby-farm.
[96] See Joslin, pp. 3–4.

G. Sale of children in particular contexts

1. Sale of children and time of contracting

52. In California, commercial surrogacy contracts created during pregnancy are viewed as sale of children, but commercial surrogacy contracts signed before embryo transfer are not.[97]

53. If the distinction is based on the theory that a human being who does not exist, or over whom there is not yet custody, cannot be sold, under such a theory babies could legally be sold for adoption so long as the contract or relinquishment was signed before the pregnancy, leading to legalization of baby-farming schemes. In the commercial world, pre-production orders of goods are common; carrying such practices into the procurement of human beings is in clear breach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Indeed, in a renowned surrogacy case, the creation of the surrogacy contract prior to conception was viewed as indicating a violation of a local law prohibition of the sale of children.[98]

2. Sale of children and parentage at birth

54. In some jurisdictions, the law defines a genetically unrelated surrogate mother as a mere "gestational carrier". If a valid pre-embryo transfer contract is entered into, the law regards the "gestational carrier" as not being the mother of the child at birth. Pre-birth procedures are implemented such that the contractual intending parent(s) are listed as the only parent(s) on the original birth document, regardless of whether or not the intending parent(s) are genetically related to the child. Proponents of this kind of approach contend that no sale of children occurs in this legal context, even where commercial surrogacy is concerned, because the "gestational carrier" cannot transfer a child that has never been hers.[99] The prior claim, analysed in section III (G) (1) above, that the time of contracting avoids the prohibition of sale of children, is often used in tandem with this argument.

55. This perspective relies on the controversial premise that a woman who gestates and gives birth to a child is no more of a mother than a childcare worker is.[100] Such perspectives also rely on the claim that the gestational surrogate mother is never a mother because she is genetically unrelated, which is contradictory to the practice of providing parentage to genetically unrelated intending parents.[101]

56. However, even if one were to accept such controversial premises and inconsistencies, in some commercial surrogacy jurisdictions it is the surrogacy contract that is primarily determinative as to parentage.[102] Hence, the gestational surrogacy contract explicitly and implicitly includes a transfer of parentage, and that transfer is usually a central part of the legal consideration for which the gestational surrogate is paid. Furthermore, the surrogate mother is also paid to give birth in a place accessible to the intending parents, and to physically hand over the child after birth; as stated above, under the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography a transfer can exist even if the transferor lacks parentage or parental responsibility.

57. The legal fiction of the "never-a-mother" gestational carrier is a legal concept which is used to justify denial of the surrogate mother's rights. Once the surrogate mother is reduced, during pregnancy, to a never-a-mother gestational carrier acting for the benefit of intending parents, the door is open to enforcing contracts that purport to alienate her rights and freedoms (e.g. the right to health and the right to freedom of movement).[103]

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[97] See footnotes 74–76 above.

[98] *Baby M.*, 537 A.2d, p. 1227 (pinpoint: p. 1240) (Supreme Court of New Jersey, 1988).

[99] See Joslin; and Smolin, pp. 311–315.

[100] Steven Snyder, "Reproductive surrogacy in the United States of America", *Handbook of Gestational Surrogacy* (2016), pp. 276–278.

[101] American Bar Association report, pp. 1, 5, 15 and 17.

[102] See Joslin; and *Johnson v. Calvert*.

[103] See Joslin; and *New Hampshire Revised Statutes Annotated*, sects. 168-B:10, B:11 and B:12 (2014).

3. Sale of children and exclusive parentage

58. Some claim that intending parents cannot buy "their own" children. However, intending parent(s) at a minimum are paying for exclusivity, so that they will not have to share parentage and parental responsibility with the surrogate mother. In order to achieve this exclusivity, intending parent(s) pay the surrogate mother to release and transfer legal parentage and parental responsibility, as well as to physically transfer the child.

59. The premise that the child is automatically the child of the intending parent(s) is also flawed. It is often the contract or the arrangement that is the basis for parentage in commercial surrogacy jurisdictions, and the contract explicitly or implicitly includes a transfer, as noted in section III (F) above.

4. Sale of children and the sale of services

60. Some argue that commercial surrogacy is merely the sale of gestational "services" and not the sale of children. Even though commercial surrogacy includes the sale of gestational services, as the surrogate mother agrees to undergo artificial insemination or embryo transfer, to gestate and to give birth to the child, commercial surrogacy as it is usually practised also includes payment for the legal and physical transfer of the child. In general, the provisions relating to the transfer of the child are of the essence of the agreement, without which the intending parents would neither enter into the agreement nor pay the surrogate mother. Hence, although commercial surrogacy includes the sale of services, it also usually includes the sale of the child.

61. Some try to evade the prohibition on sale of children by inserting into surrogacy agreements a provision stating, in substance, that the parties agree that all payments are for services and none are for the transfer or sale of the child. However, the prohibition on sale of children cannot be avoided by contracts arbitrarily relabelling the sale of children as something else, when in substance the arrangement includes the sale of children.

5. Sale of children and intermediaries

62. Intermediaries are often responsible for creating and participating in surrogacy markets, and often receive the largest profits. Where the interactions between the intending parent(s) and the surrogate mother constitute sale of children, intermediaries would normally be complicit, and hence legally responsible, given their intermediary role in establishing and mediating the relationship between the intending parent(s) and the surrogate mother. Prosecutions for sale of children in the context of surrogacy should focus primarily on intermediaries, and, absent exceptional circumstances, they should not include surrogate mothers, who may often be regarded as exploited victims.

63. Intermediaries who physically or legally transfer the child to intending parents in exchange for "remuneration or any other consideration" are directly liable for the sale of the child. Some intermediaries exercise extraordinary physical or legal control over the surrogate mother, and exercise direct control over the surrogate-born child. In such instances, the intermediary may be primarily responsible for the transfer of the child, and thus may be directly liable in appropriate cases for the sale of the child.

6. Sale of children and the rejection of a "right to a child"

64. International and regional human rights instruments protect the right to "found a family" or the right to "respect for ... private and family life."[104] The language of a "right to procreate" is used in some national legal systems, though this terminology is not found in international human rights instruments. On bases such as these, it is sometimes argued that all adults are entitled to create a family and raise children. However, it is recognized that there is no "right to a child" under international law.[105] A child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing

[104] See, for example, the International Covenant on Civil and Political Rights, art. 23 (2); the European Convention on Human Rights, art. 8; and the American Convention on Human Rights, art. 17 (2).

[105] See, for example, Saclier, "Children and adoption", pp. 12–13; and Van Bueren, *The International Law on the Rights of the Child*.

a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights.

65. In general, advocates for commercial surrogacy are not asking the State to grant them "privacy" in the sense of leaving them alone to conduct their private and family life without State interference. On the contrary, commercial surrogacy advocates seek to enlist the State in enforcing surrogacy contracts in ways that strip children of rights to best interests protections, and rights to identity and access to origins, while simultaneously stripping surrogate mothers of parentage status and autonomy over health-care decisions. Commercial surrogacy advocates seek and sometimes obtain legislation that empowers intermediaries and intending parents at the expense of children and surrogate mothers.[106] Furthermore, the complex networks of contracts and highly paid intermediaries and the financial transactions typically involved in commercial surrogacy arrangements are not the sorts of matters viewed as immune from regulation.

7. Sale of children and the role of regulation

66. Some may agree that unregulated surrogacy can lead to the sale of children, but argue that well-regulated commercial surrogacy systems will not. Similarly, some may suggest that purportedly well-regulated commercial surrogacy systems in developed countries avoid the sale of children, even if international commercial surrogacy systems operating in developing countries often do not.[107]

67. It is accurate that unregulated commercial surrogacy systems often involve the sale of children, and are subject to abusive practices and rights violations. Thus, the Committee on the Rights of the Child has specifically warned that surrogacy, "if not clearly regulated, amounts to sale of children".[108]

68. However, it is not accurate that regulated commercial surrogacy systems avoid the sale of children. Thus, in 2017, the Committee on the Rights of the Child stated, in regard to the United States, that it was "nevertheless concerned that widespread commercial use of surrogacy in the State party may lead … to the sale of children. The Committee is particularly concerned about the situations when parentage issues are decided exclusively on a contractual basis at pre-conception or pre-birth stage."[109] The Committee's concern is directly applicable to regulated commercial surrogacy jurisdictions in the United States, which generally have enacted legislation making commercial surrogacy contracts enforceable and determinative as to parentage.[110]

8. Sale of children and altruistic surrogacy

69. In theory, a truly "altruistic" surrogacy does not constitute sale of children, since altruistic surrogacy is understood as a gratuitous act, often between family members or friends with pre-existing relationships, and often without the involvement of intermediaries. Hence, in theory, altruistic surrogacy is not an exchange of payment for services and/or transfer of a child based on a contractual relationship. However, the development of organized surrogacy systems labelled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries, may blur the line between commercial and altruistic surrogacy. Therefore, labelling surrogacy arrangements or surrogacy systems as "altruistic" does not automatically avoid the reach of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and it is necessary to appropriately regulate altruistic surrogacy to avoid the sale of children. Courts or other competent authorities must require all "reimbursements" to surrogate mothers to be reasonable and itemized, as otherwise "reimbursements" may be disguised payments for transfer of the child. Payments

[106] See footnotes 47–60 and 75–80 above.

[107] See, for example, Snyder, p. 284.

[108] See CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

[109] Ibid.

[110] See Joslin.

to intermediaries, whether for-profit or not-for-profit, may be considered an indication of commercial surrogacy, and should be reasonable and itemized. There is particular risk when significant reimbursements or payments are made using open-ended categories such as "pain and suffering" or "professional services".

9. Sale of children and recognition of foreign surrogacies

70. States that prohibit all surrogacies, or commercial surrogacies, often face a situation where their nationals evade their laws by conducting a surrogacy abroad and then seek to bring the child home. Cross-border surrogacies are mostly commercial surrogacies mediated by for-profit intermediaries, and are usually conducted in jurisdictions that permit commercial surrogacy. The State of the intending parents should not assume that such surrogacies are altruistic. Given the risk of sale of children in both regulated and unregulated commercial surrogacies, States generally should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad. The State of the intending parents is responsible for conducting post-birth best interests determinations, protecting the child's identity rights and access to origins, and making independent assessments as to parentage, and also for inquiring into the treatment and post-birth consent of the surrogate mother. The State of the intending parents should only grant parentage and parental responsibility to intending parents after such evaluations, based on the best interests of the child. The child must not be punished or discriminated against due to the circumstances of his or her birth, and the rights of surrogate-born children must be protected.[111] The States concerned, namely the State(s) of the intending parents and the State in which the child is born, are responsible for ensuring that statelessness does not occur.

10. Sale of children and post-birth relinquishments

71. The requirement that the surrogate mother have non-exclusive parentage and parental responsibility at birth is necessitated by the norm against sale of children, and protects the rights of the surrogate mother. Nonetheless, where the surrogate mother, after the birth, does not wish to retain parentage or parental responsibility, the best interests of the child require that there be a legal mechanism for transfer of the child. All States are responsible for establishing such a mechanism in surrogacy arrangements, for the post-birth transfer of the child, even if they otherwise do not permit parents to relinquish children or transfer parentage.

IV. Conclusions and recommendations

A. Conclusions

72. **Commercial surrogacy could be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child. In order to turn this into more than a legal fiction, the following conditions would all be necessary. First, the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. Hence, the surrogate mother would be viewed as having satisfied any contractual or legal obligations through the acts of gestation and childbirth, even if she maintains parentage and parental responsibility. Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract. If the surrogate mother chose to maintain parentage and parental responsibility, she may be legally obligated to share parentage and parental responsibility with others, including the intending parent(s). However, the surrogate mother would not be obligated to relinquish her own status by the surrogacy arrangement. Any choice by the surrogate mother after the birth to legally and**

[111] See the cases cited in footnote 32 above.

physically transfer the child to the intending parent(s) must be a gratuitous act, based on her own post-birth intentions, rather than on any legal or contractual obligation.

73. A properly regulated system of commercial surrogacy would also provide necessary protections for children, including post-birth individualized best interests of the child determinations, appropriate suitability reviews of intending parents, and protections of rights of origin and access to identity. For the protection of all parties, it is appropriate to conduct screenings and reviews of surrogacy arrangements prior to pregnancy, but pre-birth processes cannot be conclusive as to parentage and parental responsibility, which can only be determined upon appropriate review after the birth. Similarly, appropriate protections of surrogate mothers, consistent with retaining the status of mother at birth, would include retention of rights of informed consent in regard to all health-care decisions, and freedom of movement and travel — including the principle that such rights cannot be alienated by contract. Appropriate regulation of the financial and medical aspects of surrogacy, and strict regulation of intermediaries, would also be necessary.

74. Commercial surrogacy is currently practised in jurisdictions where even genetically unrelated surrogate mothers retain parentage at birth (e.g. the Russian Federation).[112] In addition, surrogacy practitioners claim that in some jurisdictions lacking surrogacy laws they practise commercial surrogacy relying on pre-existing rules related to parentage, termination of parental rights, and adoption, resulting in post-birth voluntary transfers by the surrogate mother to the intending parent(s) and post-birth parentage orders.[113] In addition, commercial surrogacy advocates claim that relatively few surrogate mothers change their mind and seek to retain parentage and parental responsibility after birth, making the risks to intending parents of surrogate mothers retaining parentage at birth rather limited. Indeed, a prominent commercial surrogacy attorney found that intending parents changed their minds significantly more often than surrogate mothers.[114] Thus, current practice indicates that commercial surrogacy can be practised under legal regimes that retain the traditional rule that the woman who gives birth is the mother at birth, and which implement appropriate post-birth procedures for transfer. Certainly, practising commercial surrogacy in unregulated environments remains highly risky and is not recommended.

75. In order to fulfil their obligation to prohibit, and create safeguards to prevent, the sale of children in the context of surrogacy, States should prohibit commercial surrogacy until and unless a proper regulatory system, which includes a clear and comprehensive legal framework, is put in place as described above. Such an approach responds to the premise that the transfer of the child is of the essence of the commercial surrogacy arrangement and therefore is a part of the consideration for the payment to the surrogate mother. It is possible for States to strictly regulate and permit commercial surrogacy without involvement in the sale of children, if they clearly enact, and enforce effectively, regulations as indicated in the present conclusions and recommendations. States should not adopt commercial surrogacy regulations based on obligatory or automatic enforcement of surrogacy contracts and accompanying pre-birth parentage orders, for such would make the States complicit in authorizing practices that constitute the sale of children.

76. Similarly, as regards altruistic surrogacy, where permitted, States should appropriately regulate the practice to prevent the sale of children and respect the international prohibition in that regard, for example by requiring that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to review by courts or other competent authorities.

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[112] See Trimmings and Beaumont, pp. 313–319; and European Parliament, "A comparative study on the regime of surrogacy in EU member States", pp. 333–338.

[113] See Trimmings and Beaumont, pp. 391–392.

[114] See https://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html.

B. Recommendations

1. At the national level

77. **The Special Rapporteur invites all States to:**

(a) **Ratify the Convention on the Rights of the Child and its three Optional Protocols;**

(b) **Adopt clear and comprehensive legislation that prohibits the sale of children, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in the context of surrogacy;**

(c) **Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;**

(d) **Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);**

(e) **Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration;**

(f) **Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority conducts an appropriate and non-discriminatory suitability review of the intending parent(s), either prior to or after the birth or both;**

(g) **Closely regulate, monitor and limit the financial aspects of all surrogacy arrangements, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;**

(h) **Regulate all intermediaries involved in surrogacy arrangements, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;**

(i) **Regulate the medical aspects of surrogacy arrangements to ensure the health and safety of the surrogate mother and child, including by placing appropriate limits on the number of embryos transferred to a woman at one time;**

(j) **Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;**

(k) **Focus any criminal or civil penalties for illegal surrogacy arrangements primarily upon the intermediaries;**

(l) **Collect, analyse and share comprehensive and reliable data, and conduct qualitative and quantitative research studies, on surrogacy arrangements and their impact on human rights, to ensure that accurate information is available, and facilitate**

the monitoring and evaluation of surrogacy systems, services and outcomes in order to develop appropriate human rights-compliant measures.

2. At the international level

78. **The Special Rapporteur invites the international community to:**

(a) **Support the work of the Hague Conference on Private International Law, in particular in relation to its study of private international law issues related to the legal parentage of children, including in the context of international surrogacy arrangements;**

(b) **Ensure that any international regulation developed in regard to surrogacy, or in regard to legal recognition of parentage in international surrogacy arrangements, focuses on both private international law and public international law, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no "right to a child" in international law;**

(c) **Ensure that any international regulation addressing recognition of parentage in international surrogacy arrangements, or addressing recognition of foreign judicial decisions on parentage, or other foreign determinations on parentage, also includes appropriate public policy exceptions barring recognition where the foreign legal system does not adequately protect the rights of the child or the surrogate mother, and provide appropriate post-birth review in cross-border commercial surrogacies in order to prevent the sale of children;**

(d) **Support the work of the International Social Service in developing international principles and standards governing surrogacy arrangements that are in accordance with human rights norms and standards and particularly with the rights of the child;**

(e) **Work cooperatively to ensure the protection of the rights of surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, which should include protection of the best interests of the child and prevention of statelessness;**

(f) **Encourage other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities to contribute, with further research, to discussions on surrogacy and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.**